United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-1507

To be argued by
HAROLD KONIGSBERG, the
Court Consenting.

UNITED STATES COURT OF APPEALS

For the Second Circuit

Docket No. 76-1507

UNITED STATES OF AMERICA,

Appellant,

-against-

ANTHONY PROVENZANO, SALVATORE BRIGUGLIO, HAROLD KONIGSBERG, and GEORGE VANGELAKOS,

Defendants-Appellees.

On Appeal from the United States District Court For the Southern District of New York

BRIEF FOR THE APPELLEE HAROLD KONIGSBERG

HAROLD KONIGSBERG
Defendant-Appellee
Pro Se
Metropolitan Correction Center
150 Park Row
New York, New York 10007

FRANK A. LOPEZ, Esq.
Of Counsel

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BRIEF FOR THE APPELLEE HAROLD KONIGSBERG

Preliminary Statement

On October 29th, 1976, the Honorable Charles E. Stewart, Jr., United States District Judge, in the United States District Court for the Southern District of New York, dismissed indictment No. 76 Cr. 580 [CES] filed June 22nd, 1976, charging Harold Konigsberg and three co-defendants Anthony Provenzano, Salvatore Briguglio and George Vangelakos[1] in two counts with the substantive crime of Kidnap-Murder and Conspiracy to commit same under Title 18 U.S.C. §§ 1201 [a] and [c] and 2, as barred by the Statute of Limitations.

The dismissal of the federal indictment left undisturbed the Murder indictment lodged against Konigsberg, Provenzano and Briguglio in the New York

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[1] The defendants-appellees will be herein after referred to by their last names.

Ulster County Court arising under the same set of facts.

Statement of Facts

The federal indictment alleged that in June of 1961, Anthony Castellito, Secretary-Treasurer of Local 560, International Brotherhood of Teamsters, was kidnapped on a ruse from New Jersey and taken to his home in Kerhonksen, New York, where he was murdered.

More specifically, the Government's theory of the case was purportedly predicated on the information provided by unindicted co-conspirator Salvatore Sinno. The Government contended that Provenzano, then President of the International Brotherhood of Teamsters, New Jersey Local 560, obtained the services of Konigsberg and Briguglio and others to muder Castellito. On or about June 5th, 1961, the plan went into operation with Government witness Sinno approaching Castellito asking him to hide one Edward Skowron[2], an alleged fugitive in Castellito's Kerhonksen home in New York. Castellito agreed and when the three arrived at their destination Vangelakos, Briguglio, Konigsberg and others were waiting and killed Castellito. The plan to bury him in Kerhonksen was aborted and Castellito's body was transported to New Jersey where it was buried. The Government also alleged that Provenzano gave consideration to Briguglio and Konigsberg for their misdeed.

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[2] Skowron is a co-conspirator but deceased.

Fifteen years later the federal authorities obtained on June 22nd, 1976, an indictment against Konigsberg and the three others now named in the indictment. Simultaneously, the federal authorities caused the New York authorities to file their own Murder indictment in Ulster County, New York.[3]

Addressing themselves to the Southern District indictment, Konigsberg, Provenzano, Briguglio and Vangelakos moved to dismiss the federal prosecution as barred by the Statute of Limitations under Title 18 U.S.C. § 3282. The District Court [Stewart, D.J.] granted the motion and dismissed the indictment.

The Government filed a timely Notice of Appeal from the adverse decision seeking a reinstatement of the federal indictment. This is the subject matter of this appeal.

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[3] The State of New York indictment lodged in County Court, Ulster County, carries No. 42/76, and is entitled People vs. Provenzano, Briguglio and Konigsberg. It is presently before the Honorable Raymond J. Mino, County Court Judge, in a pre-trial setting. The outcome of this appeal will not disturb that prosecution.

Question Presented

Was the District Court correct in prohibiting the instant federal prosecution for a 1961 Kidnap-Murder under 18 U.S.C. §§ 1201 [a] and [c] as time-barred by the five years Statute of Limitations, pursuant to 18 U.S.C. § 3282, in a prosecution brought fifteen years later (June 22nd, 1976) and after the United States Supreme Court in United States v. Jackson, 390 U.S. 570 (1968), held the death penalty provisions unconstitutional as enacted in § 1201 and Congress thereafter on October 24th, 1972, amended the statute eliminating the death penalty and substituted instead punishment "by imprisonment for any term of years or for life." 86 Stat. 1072 ?

The Applicable Statutes, The Supreme Court Mandate and the Congressional Amendment

The federal Statute of Limitations as to criminal actions is governed by two sections, 18 U.S.C. §§ 3281 and 3282.

18 U.S.C. § 3281, provides:

> "Capital offenses. -An indictment for any offense punishable by death may be found at any time without limitation except for offenses barred by the provisions of the laws existing on August 4th, 1939."

18 U.S.C. § indicated that:

> "Offenses not capital. - Except as otherwise provided by law, no person shall be prosecuted, tried or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed."

In 1961, at the time of the crime charged in the instant indictment, there is no dispute that it was the intent of Congress to place the Kidnapping statute, 18 U.S.C. § 1201, within 18 U.S.C. § 3281, without time-bar as to prosecution. The statute at the time read that the offense was punishable by death:

> "[1] ...if the kidnapped person has not been liberated unharmed and if the verdict of the jury so recommend, or [2] by imprisonment for any term of years or for life, if the death penalty is not imposed."

In United States v. Jackson, supra, the Supreme Court ruled that the death penalty provisions of 18 U.S.C. § 1201, were unconstitutional. Prior to the

filing of the instant indictment Congress considered in 1972, the import of 18 U.S.C. § 1201 and eliminated the death penalty provisions of the statute entirely, which were in any event nullified by the Supreme Court decision in Jackson, supra. More important, Congress made no attempt to preserve or save the death penalty by amending the statute or rewriting the death provision along the guidelines announced both in Jackson and in Furman v. Georgia, 408 U.S. 238 (1972), of which Congress was obviously familiar at the time of its reconsideration of the statute.

ARGUMENT

POINT ONE

The Effect of Jackson Was To Extinguish The Death Penalty Provision of 18 U.S.C. 1201 As If It Never Existed.

The Government concedes that the criteria for determining whether to apply 18 U.S.C. § 3281 (no time bar) or § 3282 (five year limitation) is the nature not of the offense but the extent of the punishment. Thus, in 1961, by providing for the death penalty Congress placed the Kidnap statute, § 1201, within the limitless provisions of § 3281. Thus prior to the decision in Jackson, supra, the test as to which statute of limitation applies was clearly announced in Coon v. United States, 360 F. 2d 550 (8th Cir. 1966), wherein a bank robbery conviction was affirmed as not barred by a five year statute of limitations in view of the fact that in that litigation the Court pointed out that the death penalty may have been imposed and the fact that it was not did not place the statute within the purview of § 3282. The Court indicated at p. 554:

> "It is beyond dispute that when an accused is charged, as here, with forcing a person to accompany him, without the consent of such person, he is charged and may be tried for an offense that may be punished by death. To be sure, the jury must so direct before the extreme penalty can be assessed, but that circumstance does not alter the fact that the offense is one which may subject the offender to death. As we have seen, the no limitation statute, § 3281, provides: 'An indictment for

> any offense punishable by death may be found at any time without limitation' etc. The clear and ordinary meaning of the words unquestionably encompasses any offense for which the death penalty may be imposed."

When a person faces trial where the imposition of the death penalty is a definitive possibility and the litigation is possible without limitation at any time during the life of the accused obviously that person for the reasons stated requires the additional and added protection of 18 U.S.C. § 3432 and Rule 24 (b) F.R.C.P. § 3432, provides that a person charged with a capital offense is entitled to at least three days before trial a copy of the indictment, a list of the veniremen, and of the witnesses to be produced on the trial, stating the place of abode of each venireman and witness. Rule 24 [b] provides twenty peremptory challenges for an offense punishable by death. Moreover, 18 U.S.C. § 3005, also protects the accused in cases involving capital crimes by permitting the assignment of two attorneys to assist in the defense. The procedural safeguards accrue to the accused precisely because he faces the death penalty and a no-limitations prosecution under § 3281. Thus in Smith v. United States, 360 U.S. 1 (1959) a case arising un der the old federal Kidnapping Act, 18 U.S.C. § 1201, the Court in insisting that the prosecution be prosecuted by indictment, stated:

> "When an accused is charged as here, with transporting a kidnapped victim across state lines, he is charged and will be tried for an offense which may be punished by death. Although the imposition of that penalty will depend on whether sufficient proof

> of harm is introduced during the trial, that circumstance does not alter the fact that the offense itself is one which may be punished by death and thus must be prosecuted by indictment."

It is clear that where as here the possibility of punishment by death was lifted as a result of the Supreme Court decision and the failure of Congress to insert a capital offense provision in the amended statute, those accused under § 1201 cannot claim the procedural safeguards which attaches in capital cases. United States v. McNally, 485 F. 2d 398 (8th Cir. 1973), cert. den. 415 U.S. 978, [no twenty peremptory challenges permitted]; United States v. Massingall, 500 F. 2d 1224 (4th Cir. 1974), [not entitled additionally to a list of veniremen and witnesses, etc.]; Cf. Reed v. United States, 432 F. 2d 205 (9th Cir. 1970); United States v. Hoyt, 451 F. 2d 570 (5th Cir. 1971), cert. dend., 405 U.S. 995 (1972); United States v. Watson, 496 F. 2d 1125 (4th Cir. 1973); United States v. Crowell, 359 F. Supp. 489 (M.D. Fla. 1973) aff'd. 498 F.2d 234 (5th Cir. 1974).

It is interesting to note that when Konigsberg asked for two attorneys to assist him in his defense against the instant charge the court below acting in the person of Judge Bonsal, who did not participate in Judge Stewart's decision to bar the prosecution, denied the request for the assignment of the two attorneys obviously cognizant of the provisions of 18 U.S.C. § 3005, and apparently determining for himself that the prosecution did not fall under the no-limitations provisions of § 3281.

It is Konigsberg's contention therefore that the test to be applied as to whether the accused is entitled to additional procedural safeguards depends not on the complexity of the offense, or the type of crime but the extent and liability of punishment. If it is capital, in the sense that it may be punished by death, then the accused is entitled to additional procedural safeguards. If it is anything less than the possibility of punishment by death then the accused is not entitled to additional procedural safeguards. This test, as we have already indicated, lies at the crux of whether § 3281 or §3282 shall apply. It is clearly the gravity of the possibility of death which is applicable and not the complexity of the nature of the offense.

When the Supreme Court eliminated the possibility of punishment by death in Jackson it is true that it did not alter the nature of the offense. Thus the Jackson court in effect concluded that the penalty provisions of the statute were severable and by stricking down as constitutionally impermissive the penalty provisions as to the death penalty preserved the offense. Its retroactive effect was to wipe out the death penalty provisions as if they never existed. As the statute of limitations depend entirely on their application as to whether or not the death penalty may or not be imposed it is clear that the Jackson decision had the effect of placing the kidnap statute within the purview of the five years limitation.

If there were any doubt as to this rationale Congress considered the matter in 1972. Congress repealed what had already been struck down by the Supreme Court

as unenforceable. At this juncture Congress had three clear paths to follow. It could have amended the statute providing for the death penalty on the guidelines available in both Jackson and Furman. It did not do so the Government argues because Congress did not clearly understand the guidelines. The argument is specious but even if this were so, Congress could have expressed its concern for the gravity of the offense, the complexity of the charge, and preserved prosecutions for time periods beyond the five years statute of limitations by making special provisions and at the same time could also have furnished procedural safeguards by extending present statutes to cover this offense. In other words, Congress could have for this specific offense changed the nature of the test to be applied in determining what statute of limitations applied by providing for a new statute or special provision to save the offense. Congress rejected both solutions and was content to merely repeal the death provision and otherwise leave the statute for the purposes of our consideration here unchanged. The effect of congressional action or inaction in this matter clarifies their intent to place the Kidnapping statute as the Court below held and the Fourth Circuit in Massingale decided outside the classification of "capital offenses" both from the nature of the punishment and the seriousness of the charge. Congress therefore from a legislative viewpoint "affirmed" Jackson leaving it unchanged and thus clearly indicating its legislative intent.

POINT TWO

The Savings Clause Does not Preserve The Instant Prosecution Barred by § 3282 Nor was It Congressional Intent That It Do so.

Faced with the constitutional mandate in Jackson as stated by the Supreme Court and confronted with the intent of Congress in eliminating the death penalty provisions of the Kidnapp Statutes in any form and failing to setforth any new statute of limitation or no limitation to govern the statute under consideration, the Government argues lastly that in any event the General Savings Clause enacted in 1 U.S.C. § 109, saves the prosecution by preserving the procedural device of the no-limitations statute under 18 U.S.C. § 3281.

It is quite apparent both from the decision of the District Court below and the cases cited in its opinion that the General Savings Clause saves penalties already imposed under the statute. The District Court indicated as well that it saves pre-repeal violations and post-repeal prosecutions. It is clear that the Government does not argue that the appellees here are still exposed to the death penalty if convicted of the crime charged. The Government's argument is therefore that the statute of no-limitations is not merely procedural but a substantive right. The fact is that the statute of limitations creates no substantive right, it does not involve any element of the crime charged in the statute and does not change or alter the

nature or complexity of the offense.

In Bridges v. United States, 346 U.S. 209 (1952) and in United States v. Obermeir, 186 F.2d 243 (2nd Cir. 1950) cert. dend. 340 U.S. 951 (1951), both the Second Circuit and the Supreme Court ruled that statutes of limitations were procedural devices precisely not within the pur iew of the penalties, forfeitures and liabilities preserved by the savings clause. Despite this and without any judicial authority the Government states in its brief, at p. 15, states:

> "The unlimited statute of limitations .s both qualitatively and quanlitatively different from the limitations statutes initially in effect in both Bridges and Obermeier. Indeed, the period during which kidnap-murder prosecutions may be brought is not a statute of limitations at all. It is a legislative determination that with respect to certain heinous crimes the offender should suffer unrelenting prosecution without limitation in time."

Congress undertook no such consideration when it considered the kidnap statute in its legislative deliberations in 1972. It made no attempt to enact into the Kidnapping Act a special unlimited statute of limitations. The fact that the Government claims that the actions of Congress might have been "inadvertent", "undesirable" and "unintended"neither saves their appeal nor the prosecution.

CONCLUSION

The Order dismissing the indictment should be affirmed.

Respectfully submitted,

Harold Konigsberg by FAL

HAROLD KONIGSBERG
Defendant-Appellee Pro Se
Metropolitan Correction Center
150 Park Row
New York, New York 10007

FRANK A. LOPEZ, Esq.
Of Counsel
31 Smith Street
Brooklyn, New York 11201
Telephone (212) 237-9500.

WIH/pmd